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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM 1936

No. 11

L. P. CHISHOLM, WALLER HOLLADAY, W. EARL CRANK, T. S. WINSTON and W. R. DUNKUM, *Petitioners,*

vs.

W. B. GILMER, Receiver of the First National Bank of Louisa, Virginia, *Respondent.*

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your above named petitioners most earnestly petition your Honorable Court to rehear its opinion, decision and decree, rendered in the above styled case on November 9, 1936, affirming the decision of the United States Circuit Court of Appeals for the Fourth Circuit affirming the decision of the United States District Court for the Eastern District of Virginia, holding that it had jurisdiction to entertain the above styled suit and the proceedings had therein.

Your petitioners, after a careful review, study and consideration of your above opinion and decision and of the cases cited therein, and the pertinent law, represent that they believe and are advised that the United States District Court for the Eastern District of Virginia was without jurisdiction to entertain said suit and the proceedings had therein, because:

1. The jurisdiction of the said United States District Court is one conferred by the laws of Congress, enacted pursuant to the Constitution of the United States, and is not derived from State statutes or forms of pleadings, practice and proceedings obtaining in the State Courts of Virginia.

On this point the record shows that the above suit was attempted to be begun in the United States District Court for the Eastern District of Virginia by a Notice of Motion drafted and signed solely by the Receiver of the First National Bank of Louisa, Virginia, by its counsel, claiming that the authority for such proceedure was authorized by and was pursuant to the State practice, pleadings and Code of Virginia, and by the Conformity Act, (R. S. 914; 28 U. S. C. A., Section 24; O. P. 1-2).

This Notice of Motion did not issue out of the United States District Court for the Eastern District of Virginia, and did not bear the seal of the Court and was not signed by the Clerk thereof, as is provided by Section 911 of the Revised Statutes of the United States, in order for that Court to exercise its jurisdiction and enter judgment against Petitioners in a personal action therein.

Upon the return day of the Notice of Motion objection was made thereto on behalf of your petitioners on the ground that the United States District Court was *without* jurisdiction to entertain such an attempted proceeding by a Notice of Motion issued and signed solely by the Receiver to enforce an alleged personal liability against your petitioners for double assessment made by the Comptroller of the Currency upon bank stocks alleged to be owned by your petitioners in the First National Bank of Louisa, because of its alleged insolvency.

The "cause of action" sought to be so asserted by such a Notice of Motion in a Federal Court and arises solely under and by virtue of the laws of the United States—Title 12, U. S. C. A., Sections 63 and 64—is a purely Federal statutory "cause of action," and there was no "like cause" existing for such a double assessment on shares of stock of either insolvent National or State banks under the laws of the State of Virginia within the meaning of the Conformity Act. That Section 911 of the Revised Statutes of the United States provided a clear, complete and adequate remedy and mode of procedure in the United States District Court is beyond the peradventure of a doubt. It applied.

The Receiver of the First National Bank, therefore, has a complete remedy *provided by and under the laws of the United States in the Federal Courts.* There was, therefore, no reason or necessity for the Receiver of the First National Bank of Louisa, Virginia, to abandon such remedy, disregard Section 911 of the Revised Statute and to try to invoke the jurisdiction of the United States Dis-

trict Court and to try to proceed differently or according to the State Statute, Section 6046 of the Virginia Code, or according to the forms, practice, pleadings, or modes of procedure existing in the State Courts of record of Virginia in cases before the State Courts.

The cause of action was not one arising under the laws of Virginia, and the remedy provided by such State laws for causes of action existing in said State Courts could not have any possible application to the institution of the above suit in a Federal Court on a purely Federal statutory liability imposed upon your petitioners pursuant to, and solely by virture of and under authority of the laws of the United States by the Comptroller of the Currency. Title 12, U. S. C. A., Sections 63 and 64.

In *Coffee* v. *U. S.*, 117 U. S. 233, 6 Sup. Ct. 717; 29 Law Ed. 890 at 891, this Honorable Court held that the practice in the Courts of the United States as to the pleadings involved in that suit were settled by the Act of June 1, 1872, now Section 911 of the Revised Statutes of the United States, and was *not* changed by Section 5 of that Act, now Section 914 of the Revised Statutes known as the "Conformity Act." There an application for a rehearing of this Court's above holding was made; but this Court, upon such rehearing, adhered to its original opinion (29 Law Ed. 681-684), and upon such rehearing said:

> "Section 914 prescribes a conformity to the practice in the Courts of the State *only* 'as near as may be' and *only* 'in like causes.' It is a proper construction of this section to hold that while the provisions of the Code of Kentucky in regard to pleadings in civil suits

in *personam* in 'like causes' in Federal Courts of Kentucky, and does *not* apply to suits in rem by the United States for the forfeiture of property after its seizure for the violation of a revenue law, because there are no 'like causes' known to the law of Kentucky."

By analogy and for like reasons, Section 914 of the Revised Statutes of the United States has no application to your petitioners' case, since the "cause of action" in your petitioners' case is one arising *solely under the laws of the United States*, and since Congress has provided in Section 911 a complete and adequate remedy and mode of procedure by which the jurisdiction of the U. S. District Court may be exercised for the enforcement of such Federal liability in the United States District Courts, and since there is no "double assessment" imposed by the laws of the State of Virginia on the stockholders of insolvent National Banks or State Banks. There is and can be no such "like cause" in the State Courts of Virginia, since the liability attempted to be asserted here under the Conformity Act is a new and wholly Federal statutory "cause of action" for which the Revised United States Statute, Section 911, provides a complete and adequate remedy in the Federal District Courts.

Your petitioners respectfully represent that where Congress has legislated and provided such a remedy, as it has in the instant case, the Conformity Act, Section 914 R. S. can have no application. It cannot supplant Section 911 or give any additional remedy or mode of procedure or authorize a proceeding different in such cases and thereby supplant that section wherever applicable by forms of procedure that may be set up in the sundry State

Courts for invoking the jurisdiction of such State Courts under State laws.

2. The result of the affirmance of the decision of the United States District Court in your petitioners' case is to authorize 48 different modes of procedure or forms of proceeding, practice, and pleadings pursuant to the 48 State laws, and substitute them for the clear, complete and adequate method or remedy provided by Section 911 of the Revised Statute. This will result in "confusion confounded" in cases where Congress has already provided a simple, clear, complete and adequate remedy and mode of procedure by Section 911 R. S., and will allow the 48 States to define and prescribe 48 different and loose procedures to invoke the jurisdiction of the United States District Courts according to whatever the State practice and forms of procedure and mode of pleading may be provided by them in lieu of the one simple and plain mode provided by Section 911 U. S. R. S., and thus supplant the plain and adequate mode for invoking the jurisdiction of the United States District Courts in the manner and form provided by Congress.

3. Your Honorable Court appears to have based its opinion, decision and decree upon the remedy or form of procedure obtaining in Virginia as to causes of action in State Courts, governed by Section 6046, Virginia Code, providing a mode of procedure for the institution of suits in the State Courts of Virginia.

Such State Statute, it is respectfully submitted, cannot create or enlarge the jurisdiction of the Federal Courts in such cases as that of your petitioners, when Congress has

provided a mode of procedure by which the jurisdiction of the United States District Court can be invoked in such cases. *Expressio unius exclusio alterius.*

It is also respectfully and with great deference submitted that the fact that the State of Virginia authorizes a proceeding by a notice of motion to begin a suit in the State Courts of record, and that such State mode of procedure is a popular one, would not and does not in any way give the United States District Courts the power or authority to disregard the mode of procedure expressly provided by Section 911, Revised Statutes. It would seem that this statement of law is so obvious to need citation of authority.

It is also with great deference respectfully urged that the fact that the State remedy by notice of motion in the State Courts under Section 6046 of the Virginia Code, was an ancient one in that State, and that the United States District Court for the Eastern District of Virginia had entertained proceedings by notice of motion in the cases of *Leas and McVitty* v. *Merriman*, 132 Fed. 510 (1904) and later (January, 1935) by the Court of Appeals for the Fourth Circuit of the United States, and also in *Ely* v. *Gimball*, 35 Fed. (2d) 171, at 173, claiming to have the authority to do so in those cases under and by virtue of the Conformity Act (R. S., Section 914; 28 U. S. C. A. 724; op. 2) cannot authorize the respondent in this case and the District Court to disregard Section 911, U. S. R. S., which provides a complete and adequate remedy for invoking the jurisdiction of the United States District Court on a purely Federal Statutory liability, and

to attempt to invoke the jurisdiction of the United States District Court by a different State remedy provided for invoking the jurisdiction of the State Courts in causes of action begun in them.

The action here was one of which the Federal Court had jurisdiction. It was a new and wholly statutory Federal liability for which Section 911 provided a remedy. Instead of following that remedy the respondent sought to invoke the jurisdiction of the Federal Court by a mode of procedure authorized by Section 6046 of the Code of Vriginia, for the institution of suits in its own State Courts. He undertook to invoke the jurisdiction of the United States District Court to recover an assessment levied by the Comptroller of the Currency of the United States on the shares of stock of an insolvent National bank, of which the United States District Court had jurisdiction under and by virtue of Title 12, U. S. C. A., Sections 63 and 64, providing for such double assessment on the stock of insolvent National banks. This "cause of action" was wholly unknown to the common law and was not created by the laws of the State of Virginia, and the respondent was given a complete remedy and method of invoking the jurisdiction of the United States District Court by Section 911 of the Revised Statutes. *The Conformity Act, Section 914, U. S. R. S., was never intended to supplant such Section 911.* The United States District Court was, therefore, clearly without jurisdiction to entertain such proceeding in your petitioners' case, under and by virtue of a notice of motion which was begun and issued solely by the respondent and his attorney, and which was not under the seal of the District Court of the United

States, nor signed by its Clerk, and did not bear the teste of the District Judge, as was required by Section 911 of the Revised Statutes in such a case.

4. The provisions of Section 914, U. S. R. S., only prescribes a conformity to the practice in Courts of Record of the State, where Congress has not *already legislated or spoken on the subject*, and has not provided a complete and adequate remedy and mode of procedure, as it has done here in your petitioners' case by Section 911, and then only "as near as may be, and 'in like cause'." By this language it was not intended that the United States District Court should abandon the mode of procedure provided by Congress for calling into exercise its jurisdiction, and abandon the method expressly declared by Congress, and to substitute one provided by the State.

The Federal Courts were created by, and their jurisdiction is derived solely from, the Constitution of the United States, Article III, Section 1, which provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish."

Acting under that Constitutional grant, the Congress of the United States created the District Courts of the United States and the jurisdiction of those Courts is, therefore, solely controlled and conferred by the Acts of Congress, and not by State laws or by Section 6046 of the Code of Virginia.

As early as 1789, by what is known as the *Judicial Act*. Congress created the United States District Courts, and by Section 911 of the Revised Statutes, *expressly* declared how the jurisdiction of those Courts could be invoked and called in to exercise by providing:

> "The writs and processes issuing from the Courts of the United States shall be under the seal of the Court from which they issue, and shall be signed by the Clerk thereof. Those issuing from the Supreme Court shall bear the teste of the Chief Justice, or when that office is vacant, of the Assistant Justice next in procedure, *and those issuing from the District Court shall bear the teste of the Judge, or when that office is vacant, of the Clerk thereof.*"

The language is "shall bear."

The States have no more power to change this method of asserting a purely Federal statutory cause of action or liability arising under the laws of Congress in the Federal District Courts than they have the power to say how writs and processes shall issue from the Supreme Court of the United States, and say that they shall not "bear the teste of the Chief Justice," or that suits shall be brought in the United States District Courts asserting a purely Federal statutory liability by a notice of motion, and that it shall *not* issue from the United States District Courts or be under the seal of those Courts from which they issue, and shall not bear the teste of the Judge, than they have the power to say that writs and processes issued by the Supreme Court of the United States shall not bear the teste of the Chief Justice, etc.

Congress having provided the respondent in the instant case with a simple, clear and adequate mode of procedure for invoking the jurisdiction of the United States District Court in such cases, this Federal procedure may not be disregarded and supplanted purely upon the theory that some lawyers in the various States may not read the Federal statutes and familiarize themselves with the remedy provided, but may disregard the Federal procedure and adopt a remedy or procedure or mode of proceeding created or authorized by State statutes in State Courts. The argument of mere convenience or unfamiliarity by the legal profession with these clear Federal remedies most certainly should be no ground for disregarding a Federal statute and the plain and simple Federal remedy and mode of procedure of invoking the jurisdiction of the Federal Courts. To abolish or disregard the Federal statutes on such grounds would tend to laxity, and would certainly not add to the standards that should be required by the Federal Courts or of the legal profession in the practice in the Federal Courts.

It is therefore respectfully submitted that the fact that the legal profession may be familiar with the practice in the State Courts and not familiar with the mode of procedure in the Federal Courts, is not a valid reason for disregarding the mode of procedure provided by Section 911, R. S., in cases where Congress has provided, as it has done here, a simple, complete and adequate mode of procedure.

It is respectfully submitted that the Conformity Act was never intended to have such effect or to supplant the

remedy and mode of procedure provided for by Section 911 R. S., and to authorize the United State District Courts to disregard that section, affording as it does a clear, complete and adequate remedy and mode of procedure to recover a liability existing under a Federal statute, and to substitute notice of motion for all (such) writs and processes issuing from the Courts of the United States," or to say that notices of motion filed in the United States District Court should *not be under the seal of the Court from which they issue, and should not be signed by the Clerk thereof and should not be served by the Marshal of the United States.*

5. Your petitioner respectfully urges that the notice of motion in this case was process within the meaning of Section 911 R. S., and it had to be under the seal of the United States District Court and signed by the Clerk thereof, and that since the notice of motion in the instant case was not under the seal of the United States District Court and was not signed by its Clerk, that it did not invoke the jurisdiction of the United States District Court or confer jurisdiction upon that Court to entertain such a procedure, as was contended at the bar of this Court in the instant case, either by the respondent merely writing a notice of motion and delivering it to your petitioners in person, or, perchance, by letting them find it, or by sending it to them through the mail.

It is respectfully submitted that there is no reason or necessity that would justify such laxity in procedings to invoke the jurisdiction of the United States. To do so would open the door to fraud and collusion in under-

taking to obtain the jurisdiction of the United States District Court by establishing that such a notice was delivered by somebody unknown to the Court, or, perchance, to try to know that it was found by your petitioners, or the defendants, or had been mailed to them, in order to establish service of such notice of motion, or not served by the United States Marshal, nor under the seal of the Court and not signed by the Clerk thereof.

The jurisdiction of the District Courts is statutory and essential and Congress undertook to say, in Section 911 R. S., that it should be exercised, certainly in cases created and arising solely under the laws of the United States, in the mode and manner provided by such statutes, and not leave it open to the States to substitute a different and a more lax method of invoking the jurisdiction of the Federal Courts, or that they could do so in any other way than by having this so-called notice of motion issued under the seal of the United States District Court, and signed by the Clerk thereof, and executed by the Marshal of the United States, an officer of the Court. Congress evidently had in mind by the adoption of this mode of procedure, the avoidance of any imposition upon the Courts and its jurisdiction, and to provide *a method of evidencing notice* to litigants and to be sure that they could be deprived of their property under the law of the land *only after due process.* Congress intended thereby to make sure that every litigant was given "notice," and was and had been afforded fair opportunity to be heard by a method provided by Congress.

It is therefore respectfully and earnestly urged that Congress provided by Section 911 R. S. that the juris-

diction of the Federal Courts could be *only* invoked by a writing, whether in form that of a process or writ, or notice of motion, when that paper, by whatever name called, was under the seal of the District Court from which it issued, and signed by the Clerk thereof, and was executed by the United States Marshal.

The sanctity of the Federal Courts, the great power of those Courts, their jurisdiction, was intended to be exercised and evidenced by requiring all papers or writings instituting suits, whether you call them processes, writs or notices of motion, to be under the seal of those Courts, signed by the Clerks theerof, and served by the Marshals of those Courts.

This protection to litigants and the citizens of the land may not, it is respectfully submitted, be disregarded or be transferred to the legislatures of the 48 different States to provide 48 different methods or modes of procedure and to define what shall be sufficient notice, not only to the litigants, but to the Federal Courts themselves.

Your petitioners duly appreciate the gravity of the great questions here involved affecting the jurisdiction of the Federal Courts and of what should be regarded as process which deprives litigants of their property and rights in the Federal Courts. Your petitioners appreciate the difficulties of this Court when it said in its opinion, at page 3, after quoting Section 911, R. S.:

> "We do not essay a definition of the word "process" in every contract. It may take on varying shades of meanings in various surroundings. For

> the present purposes it is enough to say that a notice of motion, if process at all, is not process issuing from a Court, and, assuredly, it not a writ."

For that reason it is respectfully submitted that whether a notice of motion is or is not in form a process, that Congress, nevertheless, prescribed that the paper writing, by whatever name it may be called, should be under the seal of the United States District Court, signed by its Clerk and served by a Marshal of the United States.

This has been so held by the Circuit Court of Appeals in the case of *Peaslee* v. *Haberstro*, Federal Cases 10, 884, where that Court set aside the summons therein "upon the ground that the summons was not signed by the Clerk or under the seal of the Court," and on the further ground that the Conformity Act *only* applied where there was no statute of the United States prescribing the practice, forms or modes of procedure, and held that it *only* applies where the statutes of the United States are silent, and that then the practice of the State Court would prevail only when the statutes of the United States had not spoken. The Court there said:

> "If the summons in this case had been signed by the Clerk it could be amended as regards the seal. As it is there is *no summons* in the *nature of process* known to this Court."

In *Dwight* v. *Merritt* (Circuit Court, S. D. N. Y.), 4 Fed. 614, a case where a motion was made to set aside the summons issued in the form provided by the statutes of New York for commencing a civil action in the State Court, was *only signed by the plaintiff's attorney, and was*

not under the seal of the Court, it was held that such a summons or *notice* was in effect the commencement of a suit, and *was in effect process,* "quite as much as a capias to appear and answer, is process." The Circuit Court of the United States there said:

> "The statute (R. S. 911) intends that all processes shall issue from the Court, where such process is to be held to be the action of the Court, and that the *evidence that it issues from the Court and is the action of the Court, shall be the seal of the Court and the signature of the Clerk."*

The Court there said:

> "It is clear that a signature by the plaintiff's attorney, without a seal and issuing from the office of such attorney, *cannot be substituted."*

There is nothing in the provisions of Section 914 which abrogates these provisions of Section 911.

In *Johnson* v. *Hedley,* Fed. Cases 7389, it was held that a summons *issued by the plaintiff's attorney was not a proper summons,* and that such a summons, notwithstanding the provisions of Section 914 of the Revised Statutes, *must be issued by the Court and have the authenticity of Court.*

In *United States* v. *Martin,* 223 Fed. 805 (E. D. N. Y.), the Court said:

> "Federal legislation, of course, must be followed, although opposed to the practice and procedure of the State Courts."

The Federal Court there held that an action may not be commenced in the Federal Courts by summons issued in the name of the plaintiff's attorney, pursuant to the mode of commencing actions in the Courts of the State of New York. See in accord *Midland Paper Company* v. *Rock River Paper Company*, 19 Fed. 252.

In re: Condemnation, 253 Fed. 433 (E. D. Tenn.), Sanford, Judge, held that an original suit in a Federal Court must be commenced by a summons or *other process* of the Court itself. *Such process must be signed by the Clerk and under the seal of the Court to be valid, regardless of any difference of provisions as to the form of State summons in State Courts; the general Conformity Act not operating to waive that specific requirement.* To cite further authorities would be superarrogation. This holding appears to be sound and unanswerable.

6. This Honorable Court appears to have overlooked the fact that it is not contended by your petitioners that the form of a Notice of Motion to recover money in the United States District Court authorized by State practice, may not be used in the Federal Courts, so far as its mere form is concerned, but in such case the notice of motion must be signed, not merely by the plaintiff or his attorneys, but must be signed by the Clerk of the United States District Court and must be under the seal of that Court, and must be served by the United States Marshal. Rose's Code, Vol. I, Sec. 901. Hughes' Fed. Proc. (2 Ed. Sec. 137). Id. 6 Ed. Sec. 3584.

The principle is that where Congress has, by statute, pointed out how the jurisdiction of the United States

Courts may be invoked and has legislated generally upon the subject by providing a mode of procedure, such legislation must be followed, even though the mere form of the writing be that of a notice of motion, or of any process or summons. Congress intended by that statute that all such writings, summons, processes and writs should issue from the Court where such paper writing is to be held to begin an action which will deprive a litigant of his property and rights, and that the evidence that the writing issued from the Court and is the action of the Court, "shall be the seal of the Court and the signature of the Clerk."

There is nothing in the provisions of Section 914, it is respectfully submitted, which abrogates in any way these provisions of Section 911 of the Revised Statutes. Such a notice of motion or writing is in the *nature of a process;* it has the effects of a process both upon the person and property of the defendants. To hold otherwise, it seems to your petitioner, would be to allow the States to provide an entirely different mode of procedure by which litigants could be deprived of their property and rights in a manner and mode different and contrary to that expressly provided by Congress. The Conformity Act, it is respectfully urged, was never so intended to so operate or to be so construed.

This Court, in *Purcell* v. *Otts,* 9 Howard 336, 13 L. Ed. 164, at 169, discusses how the jurisdiction of the Federal Courts may be invoked in suits in personam between litigants. This Court held:

> "Jurisdiction is acquired in one of two modes: against the property of the defendant within the

service of process, or, secondly, by a procedure against the property of the deefndant within the jurisdiction of the Court."

If the notice of motion in the instant case is not in the form of process, it, nevertheless, takes the place of process, and, in substance and to all intents and purposes, is process and has the effect of process, and in order to give the United States District Court jurisdiction it should be required to be issued under the seal of the District Court and to be signed by the Clerk thereof. It is in effect a "writ or process," although in form of a notice of motion, and should be held to be governed by the Revised Statutes, Section 911, both as to issuing under the seal of the Court and being signed by the Clerk.

In *Cooper* v. *Reynolds*, 10 Wallace 308, 19 L. Ed. 931, at 932, this Court, determining the manner of the exercise of the jurisdiction of the United States Court, held that *the jurisdiction of the person* is obtained by the service of *process*. This Court thus held that the method of obtaining jurisdiction of the *person* was by the *service of process* on a litigant. This was clearly so, and Congress so declared by Section 911, R. S., and how that process should issue and be signed.

It is respectfully urged that a State cannot abrogate this requirement as to obtaining jurisdiction of the person, and that any paper writing, whether it be in form of a notice of motion as required by some States, or by a process or writ or summons, must be under the seal of the United States District Court from which it issues, and be signed by the Clerk thereof. To hold otherwise would

be to say that the 48 different States, through their several legislatures, could determine how the jurisdiction of the person in a Federal Court could be obtained, and could prescribe that it could be obtained in a way and manner different from that prescribed by Congress.

It is respectfully urged that this Honorable Court, in affirming the decision of the Circuit Court of Appeals for the Fourth Circuit, affirming the decision of the United States District Court for the Eastern District of Virginia, should have followed the above cited decisions of the Federal Courts, and thus established one uniform method of invoking the jurisdiction of the United States District Courts, where jurisdiction is sought to be obtained *of the person*, and should have required all such suits to have been begun by a paper writing, issued under the seal of the United States District Court and signed by the Clerk thereof as required by Section 911 R. S., *in order to have established one uniform practice in every District Court of the United States, and in order to have protected the person sued*, and the Court, from possible imposition, collusion and fraud, as to whether the defendants had or had not notice and had had his day in Court.

The contention that the jurisdiction on the person in the Federal Courts may be obtained by any method or way provided by a State statute, whether it be by letter, merely posted, or by some unofficial and unknown person claiming to have handed a copy of the notice or paper to such person, or whether by losing it and that the defendant had found such a notice, would be to strike down the great and fundamental right and sanctity and safety that attaches

to and that will call into power the jurisdiction of the Federal Courts. It is, with great deference, respectfully submitted, that the reasons of the above cited Federal cases from New York and elsewhere should be held to be controlling in the instant case; that they represent the sounder and safer view, and insure that no person shall be deprived of his property and of his rights except as provided in Section 911 of the Revised Statutes, namely: by the issuance of a process, writ, or notice of motion *under the seal of the Court and signed by the Clerk thereof.*

CASES CITED IN THE OPINION OF THIS COURT DISTINGUISHED

The case of *Iowa Central Railway Co.* v. *Iowa*, 160 U. S. 389, was begun in a State Court of Iowa to foreclose a mortgage. The case finally found its way to this Court, which, in effect, held that the Constitution of the United States did not attempt to choose between one method and another of a procedure to foreclose mortgages in State Courts. There the suit was begun and prosecuted under and pursuant to the State law, practice and procedure and by a form of action proper in the State Court of Iowa. This Court held that such a State procedure afforded due process of law. That suit did not relate or refer to how the jurisdiction of the United States should be invoked as to the person, in the Federal District Courts in a suit asserting a purely Federal statutory liability, as to which the United States Revised Statutes, Sec. 911, expressly provides how the jurisdiction of the United States District Court may be invoked under section 911, R. S.

The case of *Shriver* v. *Wodbine Bank,* 285 U. S. 467, at 477; 52 S. Ct. 430, was begun by an Iowa Banking Corporation in the Courts of that State under a State statute providing for an assessment made under it for the restoration of any impairment of capital of a bank by assessment pro rata of the stockholders. The case came to this Court under the Judicial Code, Section 237, from the judgment of the Iowa Supreme Court. *The method of invoking the jurisdiction of the Federal Court on a purely Federal statutory liability appears not to have been involved at all in that suit.* This Court there appears to have only held that the Iowa statute declaring State bank stockholders personally liable to pay assessments made under the State statute was not unconstitutional as impairing the obligation of contract or depriving him of his property without due process of law, and did not violate the 14th amendment to the Constitution of the United States. This Court, however, did hold, syllabus 6, and in clauses 6 and 7:

> "It is true that where a statute creates a liability and provides a remedy by a suit specificially adapted to its enforcement, other less appropriate common law remedies are impliedly excluded."

and cited many cases in support of this holding.

Your petitioners respectfully represent that by analogy and like reasoning this Court should have held that where Congress has created a liability, as it has in the instant case, under Title 12, U. S. C. A., Sections 63-64, and has provided a remedy by suit in the Federal Courts by the issuance of process, as is provided in Section 911, R. S.,

other remedies provided by State Statutes "are impliedly excluded."

The *Shriver* v. *Woodbine case*, therefore, insofar as it has any application to the jurisdictional question now before this Court, it is respectfully urged, sustains your petitioners' contention in the instant case.

The case of *Coffin Bros.* v. *Bennett*, 277 U. S. 29, at 31; 48 S. Ct. 422, was begun by a State Bank under the banking acts of the State of Georgia, to recover a double assessment imposed by the State Banking Laws of Georgia, and making such assessment a lien on the property of the stockholders. It was held by this Court that such a State statute did not violate "due process of law," in violation of the 14th amendment to the Constitution of the United States. There, as in the Iowa case, no question was involved as to the jurisdiction of a Federal Court, or as to the mode or method of invoking such jurisdiction.

In *Bernheimer* v. *Converse*, 206 U. S. 516, at 529; 51 L. Ed. at 524, the question there involved was as to the validity of the assessment upon the stockholders and the liability of a Minnesota corporation for the payment of a stockholder's liability, and the right to recover the same in a Federal Court *in a State other than the one in which the original proceedings in liquidation were had.* The jurisdiction of this Court under Section 911 of the Revised Statutes and as to the method or mode of procedure, appears not to have been involved.

Christopher v. *Norvell*, 201 U. S. 216, at 225-226; 50 L. Ed. 732, appears to have involved only the question as

to whether the *coverture* of the legatee of shares of stock in a National Bank, when her name was placed upon the bank's books as a stockholder and when she received the certificate of stock, did not protect her against a personal judgment at law for the amount due as a shareholder under an assessment made by the Comptroller of the Currency, to pay the debt of the bank. *It in no way involved the question of the jurisdiction of the District Court.* This Court there held that under the Revised Statutes, Sections 5151, 5152 and 5234, a married woman became *individually* responsible to the amount of her stock at the par value thereof, and that such *individual* responsibility upon the shareholders of a National bank, made no exception in favor of a married woman (735).

Your petitioners appreciate the pronouncement of this Honorable Court that, "A Federal Court, adhering to the Conformity Act, must follow the local practice *unless* some other act of Congress created an exception to the general duty of the Conformity Act,—as declared a specific rule,"—but they respectfully urge that it cannot be gainsaid, that under Section 911 of the Revised Statutes of the United States Congress, "has declared a specific rule" —has legislated—whereby the respondent, the receiver of the First National Bank of Louisa, to recover from your petitioners the double assessment imposed under Title 12, U. S. C. A., Sections 63-64, by the Comptroller of the Currency, *could proceed in the United States District Courts by issuance of process or by a notice of motion* provided that such a proceeding in the United States District Court is under the seal of the Court and signed by the Clerk thereof, and served by its Marshal, as hereinbefore stated.

The cases of *Ex parte Fisk*, 113 U. S. 713; *Whitford* v. *Clark County*, 119 U. S. 522; *So. Pac. Co.* v. *Denton*, 146 U. S. 202, at 209, cited in the printed opinion of this Court at page 9, are not in conflict with this contention, since Section 911 excludes a procedure by notice of motion which is simply signed by the receiver of a bank, or by and through his attorneys. Such a motion, when authorized by State practice, may be used in the Federal Courts, *but it is respectfully urged* that in such case the *notice of motion must be signed*, not alone by the attorneys of the plaintiff, *but must issue from and be under the seal of the Court and must be signed by the Clerk thereof.*

As was said by Mr. Hughes in his 6th edition, cited *supra:*

> "In general the forms of such processes that obtain in the State Courts are adopted in the Federal Courts, except that there can be *no* departure from the Federal statutory requirements as to the sealing, signing and testes of writs and processes."

For the foregoing reasons your petitioners respectfully urge that this their petition for rehearing may be granted, and that the opinion, decision and decree of this Honorable Court may be reheard, reviewed and reversed.

Respectfully submitted,

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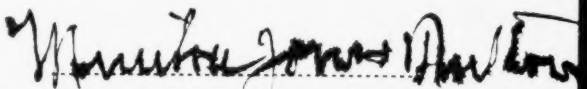
CERTIFICATE OF COUNSEL

The undersigned, Minitree Jones Fulton, member of this Bar, and of counsel herein for petitioners, hereby certifies that the foregoing petition is presented to this Court in good faith and not for delay.



MINITREE JONES FULTON.

November 30, 1936.